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Nos. 97-1549, 97-8295, 97-8305, 97-8328, and 97-8374

In the Supreme Court of the United States

OCTOBER TERM, 1997

WALTER FROST, ROBERT EUGENE TURNER, PEGGY YOUNG POTTER, RICHARD THOMAS CONGO, AND DENNIS ALLEN FAULKNER, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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36 pp

QUESTIONS PRESENTED

1. Whether the court of appeals' decision reversing petitioners' convictions on certain counts of the indictment based on insufficiency of the evidence, while upholding their convictions on other counts, resulted in a constructive amendment of the indictment or an impermissible variance between the charges in the indictment and the basis on which certain convictions were upheld on appeal.

2. Whether petitioners were properly convicted under the mail fraud statute for a scheme to defraud an employer of the honest services of its employees.

3. Whether the government's failure to disclose exculpatory information concerning allegations in certain counts of the indictment entitled petitioners to a new trial on other counts that were unrelated to the potentially exculpatory testimony.

4. Whether, on the facts of this case, a supplemental jury charge similar to the one approved by this Court in *Allen* v. *United States*, 164 U.S. 492 (1896), was impermissibly coercive.

5. Whether the district court erred in denying petitioners' request for a post-trial hearing to determine whether a juror had been exposed to any improper extrinsic influence when she left the jury room for a brief period.

6. Whether the district court abused its discretion by not declaring a mistrial or excusing a juror after the juror reported to the court that she had heard, and had repeated to other jurors, a comment made by petitioner Turner.

7. Whether the district court abused its discretion by denying petitioner Potter's motion for a severance.

8. Whether the district court's failure to submit the issue of materiality to the jury constituted plain error warranting reversal of petitioner Congo's conviction for making a false declaration before the grand jury.

9. Whether the evidence was sufficient to support petitioners' convictions.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A at 1-65)[1] is reported at 125 F.3d 346. The opinion of the district court (Pet. App. B at 1-11) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on September 12, 1997. A petition for rehearing was denied on December 16, 1997. Faulkner Pet. App. B. The petition for a writ of certiorari in No. 97-8328 was filed on March 14, 1998. The petitions in Nos. 97-1549, 97-8295, 97-8305, and 97-8374 were filed on March 16, 1998. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. In the late 1980s and early 1990s, petitioner Frost was a professor at the University of Tennessee Space Institute (UTSI) in Tullahoma, Tennessee.

[1] "Pet. App." refers to the appendix to the petition filed in No. 97-1549.

Frost was also the owner and president of FWG Associates, Inc. (FWG), a research firm that relied primarily upon contracts with government agencies such as the National Aeronautics and Space Administration (NASA) and the Department of Defense. Petitioner Turner was a part-time professor at UTSI and a vice-president of FWG. Between 1987 and 1990, petitioners Potter, Congo, and Faulkner were federal employees pursuing either a master's or a doctoral degree at UTSI with tuition payments from the government. Each of the three was an employee of NASA or the Department of the Army who could benefit FWG through his or her government position. Frost and Turner provided written materials and assistance from FWG employees to Potter, Congo, and Faulkner, thereby enabling each of the students to receive a graduate degree without completing a legitimate thesis or dissertation. In addition, Frost and Turner, who served on the committees before which each student orally defended his or her thesis or dissertation, concealed from the other members of the committees that the thesis or dissertation under review was not the student's own work. Pet. App. A at 2-3, 18, 29, 63.

2. A 31-count superseding indictment returned in the United States District Court for the Eastern District of Tennessee charged each petitioner with multiple counts of mail fraud, in violation of 18 U.S.C. 1341. See C.A. App. 89-112. Counts 1 through 16 alleged a scheme to defraud the United States of money and property. The mailings charged in Counts 1, 8, and 15 were invoices submitted by UTSI to federal agencies for tuition for each student petitioner. The indictment charged Frost and Turner with all three of those counts, and each student with the count relating to his or her own tuition payments. *Id.* at 98-103. The mailings charged in Counts 2 through 7,

9 through 14, and 16 were vouchers and claims relating to various contracts or modifications of contracts between FWG and federal agencies, which Potter, Congo, and Faulkner allegedly secured for FWG through their government positions. Frost and Turner were charged with all of those counts, and each student petitioner was charged with the counts relating to contracts with which he or she was involved. *Ibid.*

Counts 17 through 20 alleged a scheme to defraud the University of Tennessee of the honest services of its employees, Frost and Turner.[2] The mailings upon which those counts were based were memoranda of certification, mailed from UTSI to the University of Tennessee at Knoxville, that the student petitioners had passed their oral examinations and were eligible to receive their degrees.[3] Frost and Turner were charged as principals in all four counts, and each student petitioner was charged as an aider and abettor in the count relating to the memorandum of certification pertaining to him or her. Pet. App. A at 3, 20; Gov't C.A. Br. 6-7.

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[2] The mail fraud statute, 18 U.S.C. 1341, proscribes mailings in furtherance of "any scheme or artifice to defraud." In *McNally* v. *United States*, 483 U.S. 350 (1987), this Court held that Section 1341 was "limited in scope to the protection of property rights" and did not criminalize schemes "designed to deprive individuals, the people, or the government of intangible rights." *Id.* at 358, 360. The following year, Congress enacted 18 U.S.C. 1346, which provides that, for purposes of the mail fraud statute, "the term 'scheme or artifice to defraud' includes a scheme or artifice to deprive another of the intangible right of honest services." Anti-Drug Abuse Act of 1988, Pub. L. No. 100-690, § 7603(a), 102 Stat. 4508.

[3] The mailing charged in Count 18 was the memorandum of certification relating to a fourth UTSI student, Charles Hill. Pet. App. A at 3, 20. Hill died before trial. *Id.* at 3.

Counts 21 through 29 alleged a scheme to defraud the federal government through the submission of false billing claims. Counts 21 and 22 charged Frost and Turner with billing the work of FWG employee Robert Smith not according to which contract he actually worked on, but according to which contract would enable Frost and Turner to request the most money. The mailings charged in those counts were vouchers submitted by FWG to the government based upon Smith's time sheets, which had been altered at Frost's direction and with the assistance of Turner. Counts 23 and 24 charged Frost with submitting fraudulent vouchers to the government in connection with trips to Las Vegas and Reno, Nevada. Counts 25 through 29 charged Frost with fraudulently billing the government for bonuses paid to himself and other FWG employees under various FWG contracts, while falsely labeling the vouchers as claims for direct labor—*i.e.*, work performed to fulfill the requirements of the contracts—thereby enabling him to receive additional payments for fringe and overhead costs. Pet. App. A at 3-4, 47-48, 53; C.A. App. 106-107; Gov't C.A. Br. 20-23.

In addition to the mail fraud counts, Count 30 charged Frost with attempted obstruction of justice, in violation of 18 U.S.C. 1503. See C.A. App. 108-109. Count 31 charged Congo with making a false material declaration before the grand jury, in violation of 18 U.S.C. 1623. See C.A. App. 110-112. Congo had testified that FWG employees offered to work on his dissertation as colleagues and friends; the indictment alleged that the testimony was false because Congo knew that "FWG employees did not offer to aid him in the preparation of his dissertation out of friendship, but were directed to do so and did work on his

dissertation because of his position with NASA." *Id.* at 112.

3. a. Petitioners' trial before a jury began on March 28, 1995. Pet. App. A at 4. Turner testified in his own defense, completing his testimony on April 20, 1995. *Id.* at 44. After Turner's testimony, one of the jurors, Golson, reported to the district court that Turner had stated to the jury as he left the witness stand, "You all take care of me." *Ibid.* When defense counsel questioned Turner about the remark, Turner insisted that he had actually stated, "I hope I don't trip again." *Ibid.* The district court interviewed Golson alone in chambers the next day. *Ibid.* The court asked the juror whether Turner "could * * * have said something like I hope I don't trip again," to which she responded, "No." *Ibid.*

Golson told the court that four other jurors had heard her report what she thought Turner had said. The court then interviewed the four jurors identified by Golson. None had heard what Turner had said, although they did hear him mumble something, but three had heard Golson say what she thought Turner had said. Golson and the other jurors assured the court that Turner's comment would not influence their verdict, that they would consider only the evidence at trial, and that they could give Turner a fair trial notwithstanding the remark. Pet. App. A at 44-45; C.A. App. 647-648.

The district court denied Turner's subsequent motion for a new trial based on that incident. C.A. App. 647-651. Turner argued that he was deprived of an impartial jury because he and Golson had disagreed about what he had said and Golson had in effect become a witness against him. The district court, however, found "nothing in the record" to show that Golson in fact knew that Turner had denied making the

comment she reported. *Id.* at 648-649. The court concluded that Turner's right to an impartial jury was not violated, noting that "[a]fter interviewing and observing the demeanor of Golson and the other three jurors," it was "satisfied that the jurors including Golson could be fair and impartial to Turner and all of the defendants." *Id.* at 648, 650.

b. The jury began its deliberations on April 24, 1995, and continued deliberating on April 26 and April 27. Pet. App. A at 35-36. On April 27, the jurors sent a note to the district court indicating that they had reached verdicts on some counts with respect to two defendants, but that they were "[d]eadlock[ed] on other counts concerning" those defendants. *Id.* at 36. The district court responded with a note asking the jurors to "consider the cases against the other defendants." *Ibid.*

When the jurors resumed their deliberations the following day, they informed the court that one juror, Shelby, had brought a newspaper article and personal notes into the jury room. During an *in camera* interview with the district court, Shelby stated that she had prepared the notes, which indicated that she was generally favorable to the defense, because she "felt a little maybe outnumbered." The court allowed Shelby to return to the jury room without the article and notes. Pet. App. A at 36; C.A. App. 633-634.

Later that afternoon, at around 2:15, the jury sent the court a message stating that "we have reached a verdict on some counts but cannot seem to on the others. Please advise." Pet. App. A at 36. The district court then delivered a supplemental jury instruction, patterned after language approved by this Court in *Allen* v. *United States*, 164 U.S. 492 (1896), requesting each juror to reconsider his or her position dur-

ing continued deliberations.[4] The jury returned a unanimous verdict at 4:15 p.m., finding each petitioner

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[4] The court gave Sixth Circuit Pattern Criminal Jury Instruction 9.04, stating as follows:

> All right. Members of the jury, we got your message here, and so I want to give you a further instruction in this case. We're going to ask that you return to the jury room and deliberate further. And I'm talking about the message that indicated that you were unable to agree on certain counts and certain matters. And I realize that you are having some difficulty in reaching unanimous agreement, but that is not unusual. And sometimes after further discussion, jurors are able to work out their differences and to agree.
>
> Please keep in mind how very important it is for you to reach unanimous agreement. If you cannot agree, and this case is tried again, there is no reason to believe that any new evidence will be presented, or that the next 12 jurors will be any more conscientious and impartial than you are.
>
> Now, let me remind you that it is your duty as jurors to talk with each other about the case, to listen carefully and respectfully to each other's views, and to keep an open mind as you listen to what your fellow jurors have to say. And let me remind you that it is your duty to make every reasonable effort you can to reach unanimous agreement. Each of you, whether you are in the majority or the minority, ought to seriously reconsider your position in light of the fact that other jurors, who are just as conscientious and impartial as you are, have come to a different conclusion.
>
> Those of you who believe that the government has proved the defendant guilty beyond a reasonable doubt should stop and ask yourselves if the evidence is really convincing enough, given that other members of the jury are not convinced. And those of you who believe that the government has not proven the defendant guilty beyond a reasonable doubt should stop and ask yourselves if the doubt you have is a reasonable one, given that other members of the jury do not share your doubt. None of you

guilty on all counts with which he or she was charged, except that Frost and Turner were acquitted on Count 18 and Frost was acquitted on Count 30. Pet. App. A at 38.

c. After the jury returned its verdict, petitioners learned that juror Shelby had left the jury room for approximately twenty minutes during the afternoon of April 28 to lie down in the clerk's office because she was experiencing chest pains. Pet. App. A at 41. Petitioners moved for an evidentiary hearing to explore whether Shelby had been exposed to any prejudicial external influence during her absence from the jury room. *Ibid.* The district court denied the request for a hearing, explaining that petitioners had "not alleged or shown that any outside, extraneous influence was brought to bear on Shelby which was likely to interfere with the impartiality of the jury deliberations or likely to be prejudicial to the defendants." C.A. App. 629.

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should hesitate to change your mind if, after reconsidering things, you are convinced that the other jurors are right and that your original position was wrong.

But remember this. Do not ever change your mind just because other jurors see things differently, or just to get the case over with. As I told you before, in the end, your vote must be exactly that—your own vote. As important as it is for you to reach unanimous agreement, it is just as important that you do so honestly and in good conscience.

What I have just said is not meant to rush or pressure you into agreeing on a verdict. Take as much time as you need to discuss things. There is no hurry.

I would ask that you now return to the jury room to resume your deliberations.

Pet. App. A at 36-37 & n.11.

d. Before trial, the government had sent a letter to defense counsel stating that it intended to call as an expert witness Chester Dailey, a government official who oversaw one of the FWG contracts under which Frost was alleged to have billed the government improperly for bonuses. The letter stated that Dailey would testify that neither the contract nor government regulations allowed Frost to bill the bonuses as direct labor and that "[i]t is [Dailey's] opinion that this practice was deceptive." Pet. App. A at 48. The government did not call Dailey as a witness at trial. *Ibid.*

After the trial, Frost filed a motion for a new trial on Counts 25 through 29 or for an evidentiary hearing, arguing that the government had violated its obligation under *Brady* v. *Maryland*, 373 U.S. 83 (1963), by failing to disclose exculpatory evidence provided by Dailey. In an affidavit attached to the motion, Dailey stated that, contrary to the government's representations in its letter, he had told the prosecutor that he saw no evidence that Frost had billed the bonuses in a deceptive manner. The district court denied the motion for a new trial or for a hearing. Pet. App. A at 48-49; C.A. App. 153-165.

e. The district court sentenced Frost to 24 months' imprisonment and ordered him to pay $126,625 in restitution to the government. The court sentenced Turner to 12 months' imprisonment and ordered him to pay $841 in restitution. Potter was sentenced to four months' imprisonment; Congo was sentenced to five months' imprisonment; and Faulkner was sentenced to three months' imprisonment and ordered to pay $1,560 in restitution. C.A. App. 113-140.

4. The court of appeals affirmed in part, reversed in part, and remanded for further proceedings and for resentencing. Pet. App. A at 1-65.

a. The court vacated petitioners' convictions on Counts 2 through 7, 9 through 14, and 16, see Pet. App. A at 65, finding "insufficient evidence to uphold the counts that rest upon an alleged scheme to defraud the federal government of property in the form of contract awards," *id.* at 6-7. The court affirmed petitioners' convictions on Counts 1, 8, and 15, which charged petitioners with defrauding the government of tuition money for the three students. *Id.* at 18-19, 65.

The court also upheld petitioners' convictions on Counts 17, 19, and 20, which alleged a scheme to defraud the University of Tennessee of the honest services of Frost and Turner. Pet. App. A at 20-33, 65. Frost and Turner argued that 18 U.S.C. 1346, which provides that for purposes of the mail fraud statute, a "scheme or artifice to defraud" includes a scheme "to deprive another of the intangible right of honest services" (see note 2, *supra*), did not apply to them because they were not public officials. The court rejected that claim, holding that "private individuals, such as Frost and Turner, may commit mail fraud by breaching a fiduciary duty and thereby depriving the person or entity to which the duty is owed of the intangible right to the honest services of that individual." Pet. App. A at 25. The court further concluded that the University of Tennessee had "a property right in its unissued degrees, and Frost and Turner had a fiduciary duty to the University when exerting their considerable influence over whether the school would give a degree to a student." *Id.* at

26.[5] The court concluded that the evidence was sufficient to sustain petitioners' convictions on the honest services counts, observing that "the record contains considerable evidence that Frost and Turner entered into an intentional scheme with each student defendant in which the professors enabled the student to submit a thesis or dissertation secretly based on plagiarism," and that "the evidence indicates that all defendants intended * * * that the University would suffer a concrete business harm by unwittingly conferring an undeserved advanced degree on each student defendant." *Id.* at 29.[6]

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[5] The court of appeals explained that "a university is a business: in return for tuition money and scholarly effort, it agrees to provide an education and a degree," and that "[a]warding degrees to * * * students who have not earned them" could damage the reputation of the university "and thereby impair its ability to attract other students willing to pay tuition, as well as its ability to raise money." Pet. App. A at 26. The district court in this case instructed the jury that Frost and Turner could be found to have deprived the University of its right to their honest services only if the professors had failed "to disclose something which in their knowledge or contemplation posed a business risk of harm or loss to their employer, the University of Tennessee." *Ibid.* The court of appeals held that the instruction "captured the proper standard for determining whether an employee has committed mail fraud by depriving his employer of honest services," explaining that "[t]he prosecution must prove that the employee intended to breach a fiduciary duty, and that the employee foresaw or reasonably should have foreseen that his employer might suffer an economic harm as a result of the breach," and that "[p]roof that the employer simply suffered only the loss of the loyalty and fidelity of the defendant is insufficient to convict." *Id.* at 27.

[6] Petitioners also challenged the district court's jury instruction on the meaning of "scheme or artifice to defraud." Pointing to the court's statement that "[a] scheme to defraud may describe a departure from fundamental honesty, moral

The court also rejected Congo's argument that Section 1346 is unconstitutionally vague. Reiterating its holding that "private fiduciaries deprive another of honest services when they, during a scheme of intentional deception, breach their fiduciary duties and reasonably do or should foresee that this breach will inflict an identifiable economic harm upon the person or entity to whom they owe their duty," the court concluded that "[t]he contours of § 1346 therefore are sufficiently clear for us to conclude that the statute is not unconstitutionally vague on its face." Pet. App. A at 31.

b. With respect to Counts 25 through 29, the court of appeals remanded for an evidentiary hearing on Frost's *Brady* claim. Pet. App. A at 65. The court explained that "Frost may be able to show a reasonable probability that the verdicts would have been different with [Chester] Dailey's testimony, and therefore show entitlement to a new trial on Counts Twenty-Five through Twenty-Nine." *Id.* at 52. It rejected the contention of Frost and Turner that the evidence provided by Dailey required a new trial on the other counts that alleged a scheme to defraud the government through improper billing (Counts 21 through 24), explaining that Dailey's testimony

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uprightness, or fair play and candid business dealings in the general life of the community," petitioners claimed that the instructions permitted the jury to convict them simply for having violated such vague standards as "fundamental honesty" or "moral uprightness." The court of appeals rejected that claim, explaining that the "disputed language * * * occurred in the context" of the district court's "detailed instructions" on the mail fraud counts, "which, as a whole, provided that the jury could not convict defendants merely for not having acted according to fundamental honesty or moral uprightness." Pet. App. A at 32-33.

"related only * * * to the counts based upon the billing of bonuses as direct costs," and was "unrelated" to petitioners' convictions on the other counts. *Id.* at 52-53.

c. The court of appeals rejected several challenges based on the circumstances of the jury's deliberations. Pet. App. A at 35-47. First, the court held that the district court had not abused its discretion by giving an *Allen* charge after the jury indicated that it was having difficulty reaching a verdict on some of the counts. *Id.* at 38. The court of appeals noted that the pattern instruction delivered by the district court "directed both majority and minority jurors to reconsider their positions" and "cautioned all jurors not to surrender their personal convictions merely in order to achieve consensus by acquiescing in the majority opinion." *Ibid.* The court rejected petitioners' suggestion that the *Allen* charge was nevertheless coercive because the district court knew when it delivered the instruction that juror Shelby favored the defense and was in the minority. The court of appeals observed that the district court "did not know whether Shelby was the lone dissenter" or "whether Shelby was leaning towards the defense or was in the minority with regards to each defendant and each count." *Id.* at 38-39. Moreover, the jury's messages to the district court indicated that it had already reached unanimous verdicts with respect to some charges. Accordingly, the court of appeals concluded that "the circumstances of this case do not compel the conclusion that a tired minority finally acceded to the majority opinion in the face of an *Allen* charge." *Id.* at 40.

The court of appeals also held that the district court had not abused its discretion by denying petitioners' request for a post-verdict hearing to deter-

mine whether Shelby had been exposed to prejudicial external influences when she left the jury room to lie down in the clerk's office. The court explained that petitioners had "presented no basis upon which to believe that Shelby even had experienced an external contact or communication regarding matters pending before the jury during her absence from the deliberations." Pet. App. A at 41-42. The court also noted that petitioners could have investigated what had occurred during Shelby's absence simply by talking to employees in the clerk's office. *Id.* at 42.

The court of appeals also rejected Turner's contention that the district court had erred by not declaring a mistrial or excusing juror Golson. Pet. App. A at 44-47. The court found no abuse of discretion in the district court's determination that Golson remained impartial, noting that the court had "interviewed Golson and believed her assertions of continued impartiality to be credible." *Id.* at 47.

d. Congo challenged the sufficiency of the evidence to support his conviction for making a false material declaration before the grand jury (Count 31), claiming that his statement to the grand jury that FWG employees offered to work on his dissertation as colleagues and friends was "literally true." The court of appeals rejected that contention. Pet. App. A at 55-56. The court explained that the testimony of FWG employee Karen Seiser, along with other "circumstantial evidence that Congo knew that his statement that Seiser had offered to work on his dissertation as a colleague and a friend was false," supported the jury's finding that "Congo lied about his beliefs concerning the motives of Seiser." *Id.* at 56.

Congo also argued that his conviction on Count 31 should be reversed because the district court, rather than the jury, had decided the issue of whether his

false statements to the grand jury were material. Because Congo had not raised that claim in the district court, the court of appeals applied the plain-error standard set forth in Federal Rule of Criminal Procedure 52(b). Pet. App. A at 56-57. Relying on this Court's decision in *Johnson* v. *United States*, 117 S. Ct. 1544 (1997), the court of appeals held that the district court's failure to submit the issue of materiality to the jury was "error" and that the error was "plain." Pet. App. A at 57. It held, however, that Congo could not show that the error had "seriously affected the fairness, integrity, or public reputation of judicial proceedings," because "the evidence of materiality in this case was overwhelming." *Id.* at 57-58. The court explained that "the grand jury was investigating whether Frost and Turner were helping students to attain their degrees without completing legitimate dissertations in exchange for agreements by the students to use their government positions to secure contracts or contract modifications for FWG," and that testimony bearing on the question whether FWG employees who worked on Congo's dissertation "did so voluntarily and on the basis of friendship, or instead acted out of compulsion and at the direction of Frost * * * was clearly capable of influencing the grand jury in its determination of whether defendants were participating in a fraudulent degrees-for-contracts scheme." *Id.* at 58.

e. Frost and Potter contended that the district court had erred by denying their motions to sever. Frost argued that not every count of the indictment should have been joined against him; Potter claimed that her case should not have been joined with those of her co-defendants and that the counts against her were joined improperly. The court of appeals rejected those claims, holding that "[t]he joining of Counts

One through Twenty, as well as Counts Thirty and Thirty-One, was proper," and that even if the counts alleging fraudulent billing under FWG contracts (Counts 21 through 29) were not properly joined with the remaining counts, "any possible error was harmless." Pet. App. A at 61-62. The court also rejected Potter's assertion that she was prejudiced by the introduction of evidence relating to misconduct by Frost and Turner, noting that the district court had instructed the jury to consider the charges and evidence against each defendant separately and that Potter's convictions which had been upheld were supported by "overwhelming evidence." *Id.* at 62-63.

ARGUMENT

1. Petitioners contend (Frost Pet. 13-19; Turner Pet. 19-25; Potter Pet. 6-15; Congo Pet. 6-9) that the superseding indictment did not allege a separate scheme to defraud the government of tuition money, and that the court of appeals' disposition of the case resulted in a constructive amendment of the indictment. That claim is without merit.

The court of appeals reversed, as unsupported by the evidence, the counts of conviction in this case that were based on a scheme to defraud the federal government of contracts. See Pet. App. A at 4-18. The court nevertheless affirmed petitioners' convictions on Counts 1, 8, and 15 of the superseding indictment. *Id.* at 65. It construed those counts as "charging [petitioners] with violating § 1341 by defrauding the government of tuition money," *id.* at 18, and found those charges to be supported by the evidence, *id.* at 19.

Contrary to petitioners' suggestion, Count 1 of the indictment did not charge merely a "degrees-for-contracts" scheme. Rather, the indictment broadly

charged petitioners with scheming "to defraud and to obtain money and property * * * from the United States and various federal agencies." C.A. App. 92; see Pet. App. A at 3. The indictment further charged that as part of the scheme to defraud, petitioners "cause[d] the government to pay for their classes in graduate programs at UTSI." C.A. App. 94. The court of appeals concluded that the evidence at petitioners' trial "easily yields the conclusion that each defendant participated in a secret scheme in which the student defendants received their graduate degrees without having completed a legitimate thesis or dissertation, thereby defrauding * * * the government of tuition money." Pet. App. A at 63. Because petitioners were properly convicted based upon proof that "correspond[ed] to an offense that was clearly set out in the indictment," there was no impermissible amendment of the indictment. *United States* v. *Miller*, 471 U.S. 130, 136 (1985); cf. *id.* at 137 (where indictment alleges a single scheme to defraud that encompasses "several relatively distinct plans," no prejudicial variance occurs if only one of the plans is proved by sufficient evidence and the jury convicts for that plan). See also *Griffin* v. *United States*, 502 U.S. 46, 56-57 (1991) ("[W]hen a jury returns a guilty verdict on an indictment charging several acts in the conjunctive, * * * the verdict stands if the evidence is sufficient with respect to any one of the acts charged.").[7]

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[7] Petitioners rely (Frost Pet. 18; Turner Pet. 24; Potter Pet. 13; Congo Pet. 8) on *Leary* v. *United States*, 395 U.S. 6 (1969). That decision is inapposite. As the Court noted in *Griffin*, *Leary* held that reversal is required when a conviction "may have rested on an unconstitutional ground." 502 U.S. at 55. The Court in *Griffin* specifically declined, however, to extend

Potter and Faulkner also contend (Potter Pet. 15-19; Faulkner Pet. 3-5) that there was a constructive amendment of the indictment or a variance with respect to their convictions on the counts that alleged a scheme to defraud the University of Tennessee of the honest services of Frost and Turner. The court of appeals concluded that the proof at trial was sufficient to sustain petitioners' convictions on those counts, pointing to evidence that "Frost and Turner entered into an intentional scheme with each student defendant in which the professors enabled the student to submit a thesis or dissertation secretly based on plagiarism," and that "all defendants intended * * * that the University would suffer a concrete business harm by unwittingly conferring an undeserved advanced degree on each student." Pet. App. A at 29. Potter and Faulkner contend, however, that the indictment charged merely that they abetted Frost and Turner "in misusing their positions at [the University of Tennessee] so that they could defraud the government and obtain contracts illegally," and that if

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that rule to situations in which one possible basis for conviction is unsupported by sufficient evidence. See *id.* at 55-60.

Petitioners' reliance (Frost Pet. 18; Turner Pet. 25; Potter Pet. 13-14; Congo Pet. 9) on *United States* v. *Glenn*, 828 F.2d 855 (1st Cir. 1987), is also misplaced. The court in *Glenn* did not announce a per se rule that the insufficiency of the evidence regarding a defendant's participation in a broad conspiracy requires reversal of counts that charge a narrower plan and that are supported by the evidence. Rather, the court engaged in a case-specific analysis of the relevant evidence before concluding that the defendant had been prejudiced by submission of the broader theory to the jury. See *id.* at 859-860. The court noted in particular that "[u]nder a proper indictment, the government could not have established venue in Rhode Island," the district where the defendant's trial occurred. *Id.* at 860. The instant case raises no similar concern.

the actions of Potter and Faulkner "defrauded the university then that is what should have been, but was not, charged." Faulkner Pet. 4, 5; see also Potter Pet. 17, 18. In fact, however, the indictment charged just that, alleging that the students aided and abetted Frost and Turner in scheming "to defraud the University of Tennessee of its right to the honest services" of the professors. C.A. App. 104. There is consequently no basis for petitioners' constructive amendment or variance claim.

2. Petitioners contend (Frost Pet. 19-21; Turner Pet. 25-27; Potter Pet. 24-26; Congo Pet. 12-14) that 18 U.S.C. 1346, which defines a scheme to defraud for purposes of the mail fraud statute to include a deprivation of the right to "honest services," applies only to the "services" of public officials or persons with fiduciary duties to the public, and does not apply to deprivations of honest services by private persons. The court of appeals correctly rejected that claim.

Section 1346 broadly defines a "scheme or artifice to defraud," for purposes of the mail fraud statute, to include a "scheme or artifice to deprive another of the intangible right of honest services." Nothing in the language or the history of Section 1346 supports the limitation that petitioners propose. Although some courts have expressed concern about "defin[ing] the outer limits of the private sector rights to 'honest services' that are * * * protected by § 1346," *United States* v. *Jain*, 93 F.3d 436, 442 (8th Cir. 1996), cert. denied, 117 S. Ct. 2452 (1997), petitioners cite no decision holding that Section 1346 is limited to schemes involving the services of public officials. Thus, con-

trary to petitioners' assertion, there is no conflict in the circuits on the question presented.[8]

Petitioners also argue (Frost Pet. 21-22; Turner Pet. 27-28; Potter Pet. 20-24; Congo Pet. 13-14; Faulkner Pet. 5-6) that the court of appeals' ruling that Section 1346 applies to schemes to deprive an employer of the right to the honest services of its employees "creates potential criminal liability so broad that it renders the statute void for vagueness." That claim is likewise without merit. Under this Court's precedents, petitioners may not successfully attack Section 1346 as unconstitutionally vague by showing that hypothetical situations may exist in which application of the statute would be ambiguous. Rather, petitioners can prevail only by demonstrating that the statute failed to provide clear warning that their own conduct was proscribed. See *Chapman* v. *United States*, 500 U.S. 453, 467 (1991) ("First Amendment freedoms are not infringed * * * , so the vagueness

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[8] Petitioners contend (Frost Pet. 19-20; Turner Pet. 26-27; Potter Pet. 25-26; Congo Pet. 13) that the Sixth Circuit's decision in this case conflicts with that court's earlier view of the intangible-rights theory expressed in *United States* v. *Gray*, 790 F.2d 1290 (6th Cir. 1986), rev'd *sub nom. McNally* v. *United States*, 483 U.S. 350 (1987). A claimed intra-circuit conflict does not warrant this Court's review, but in any event, there is no conflict. As the court of appeals explained (Pet. App. A at 24-25), the Sixth Circuit, sitting en banc, subsequently rejected the suggestion in *Gray* that the mail fraud statute, as lower courts had construed it before *McNally*, did not apply to schemes by private fiduciaries to defraud private parties of their right to honest services. See *United States* v. *Runnels*, 877 F.2d 481, 483-484 (6th Cir. 1989) (en banc) ("The trial judge, correctly in our opinion, read *Gray* to have no effect on the doctrine that the [pre-*McNally*] intangible rights theory was 'applicable to non-public officials where a fiduciary duty is involved.'").

claim must be evaluated as the statute is applied to the facts of this case."); *United States* v. *Mazurie*, 419 U.S. 544, 550 (1975) ("[V]agueness challenges to statutes which do not involve First Amendment freedoms must be examined in the light of the facts of the case at hand."); *Parker* v. *Levy*, 417 U.S. 733, 756 (1974) ("One to whose conduct a statute clearly applies may not successfully challenge it for vagueness.").

In this case, as the court of appeals observed (Pet. App. A at 29), petitioners engaged in an "intentional scheme" in which Frost and Turner "enabled [each] student to submit a thesis or dissertation secretly based on plagiarism." Thus, the court found (*ibid.*), "[t]he inescapable conclusion is that defendants intended for Frost and Turner to breach the trust which the University had placed in them." Because a "person of ordinary intelligence," *Buckley* v. *Valeo*, 424 U.S. 1, 77 (1976) (per curiam), would know that petitioners' conduct defrauded the University of its right to the honest services of its professors, the application of Section 1346 did not violate due process.[9]

3. The court of appeals concluded (Pet. App. A at 47-53) that the district court should have conducted an evidentiary hearing on Frost's claim that the government violated its obligation under *Brady* v. *Maryland*, 373 U.S. 83 (1963), by failing to disclose exculpatory evidence provided by Chester Dailey. The court accordingly remanded the case for a hearing to de-

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[9] Turner argues (Pet. 10-11) that he was not on the "payroll" of the University of Tennessee and therefore owed no fiduciary duty to the University. Even assuming the correctness of that claim, the indictment also charged Turner with aiding and abetting Frost in defrauding the University of its right to Frost's honest services. C.A. App. 104.

termine whether Frost should receive a new trial on Counts 25 through 29. Pet. App. A at 65. Frost and Turner contend (Frost Pet. 22-25; Turner Pet. 29-31) that the court of appeals should have remanded for a hearing to determine whether they should receive a new trial on Counts 21 through 24 as well, which also alleged a scheme to defraud the government through improper billing. The court of appeals correctly rejected that claim.

In *Brady*, this Court held that "the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment." 373 U.S. at 87. The Court has subsequently explained that "favorable evidence is material, and constitutional error results from its suppression by the government, 'if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different.'" *Kyles* v. *Whitley*, 514 U.S. 419, 433-434 (1995) (quoting *United States* v. *Bagley*, 473 U.S. 667, 682 (1985) (opinion of Blackmun, J.)). In this case, as the court of appeals explained (Pet. App. A at 52-53), Dailey's testimony related only to the counts based upon the billing of bonuses as direct costs (Counts 25 through 29). Because the testimony was unrelated to the other billing counts (Counts 21 through 24), which were based upon improper billing for travel and for work performed by an FWG employee, there was no "reasonable probability" that disclosure of the exculpatory evidence would have altered the outcome of the trial with respect to those counts.

4. Turner raises three claims concerning the jury's deliberations. All were correctly rejected by the court of appeals and none warrants further review by this Court.

a. Turner first argues (Pet. 6-8) that, on the particular facts of this case, the district court's use of the *Allen* charge was impermissibly coercive. In *Allen* v. *United States*, 164 U.S. 492, 501-502 (1896), this Court held that it was proper for a district court to give a supplemental instruction to a deadlocked jury encouraging the jurors to be open-minded and to reconsider their views if possible so that a verdict might be reached. The Court again upheld the propriety of such a charge in *Lowenfield* v. *Phelps*, 484 U.S. 231, 237-241 (1988). The Court observed that every circuit has approved the use of some form of supplemental instruction advising jurors of their duty to deliberate and to attempt to reach a verdict. *Id.* at 238 n.1.

Whether an *Allen* charge is impermissibly coercive depends on the terms of the charge, its context, and "all the circumstances." *Jenkins* v. *United States*, 380 U.S. 445, 446 (1965); *Lowenfield*, 484 U.S. at 237. As the court of appeals correctly observed (Pet. App. A at 38), the *Allen* charge given here was "properly worded."[10] Indeed, petitioner does not object to the language of the charge; rather, his sole objection

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[10] The court of appeals noted (Pet. App. A at 38) that the instruction given by the district court "directed both majority and minority jurors to reconsider their positions" and "cautioned all jurors not to surrender their personal convictions merely in order to achieve consensus by acquiescing in the majority opinion." Thus, the instruction did not run afoul of the primary criticism of the *Allen* charge—namely, that it directs only jurors in the minority to reexamine their views. See, *e.g.*, *United States* v. *Flannery*, 451 F.2d 880, 883 (1st Cir. 1971); *United States* v. *Thomas*, 449 F.2d 1177, 1183 (D.C. Cir. 1971); *United States* v. *Sawyers*, 423 F.2d 1335, 1342 (4th Cir. 1970); *United States* v. *Fioravanti*, 412 F.2d 407, 417 (3d Cir.), cert. denied, 396 U.S. 837 (1969).

(Pet. 6) is that the instruction was given "after taking a break to allow one of the jurors who was crying to compose him or herself, and with the understanding that [j]uror Shelby, perhaps the same juror that was crying, felt outnumbered." In denying petitioners' motion for a new trial, however, the district court specifically noted that it had informed counsel before giving the *Allen* charge that the crying juror was not Shelby "and that the tears were caused by a problem unrelated to jury deliberations." C.A. App. 626. Moreover, as the court of appeals explained (Pet. App. A at 38-39), although the district court knew that Shelby was in the minority and favored the defense, the court did not know whether Shelby was the "lone dissenter" or was "leaning towards the defense or was in the minority with regards to each defendant and each count." Indeed, the district court was aware that the jury had reached unanimous verdicts with respect to some counts of the indictment. *Id.* at 40. Petitioner suggests no reason to conclude that an evenhanded reminder of the jurors' duty to consult with each other and to reach a consensus if they could do so without violence to their individual judgments was impermissibly coercive in those circumstances.

b. Turner contends (Pet. 8-10) that the district court should have conducted a post-verdict hearing to determine whether juror Shelby had been exposed to any improper extrinsic influence when she left the jury room for a brief period to lie down in the clerk's office. Turner relies on *Remmer* v. *United States*, 347 U.S. 227 (1954). In that case, a juror reported to the judge during a criminal trial that he had been contacted by a stranger who had told the juror that he could profit by returning a verdict favorable to the defendant; the FBI then investigated the matter and submitted a report to the judge and prosecutors. *Id.*

at 228. This Court remanded for a hearing to determine whether the incident was harmful to the defendant and, if so, to grant a new trial *Id.* at 229-230. Turner contends (Pet. 9) that under *Remmer*, the district court was required to conduct a hearing to "explore[]" the "circumstances surrounding Shelby's absence from the jury room."

As this Court has observed, however, "it is virtually impossible to shield jurors from every contact or influence that might theoretically affect their vote." *United States* v. *Olano*, 507 U.S. 725, 738 (1993). Thus, courts have held that a post-verdict hearing is required only when the defendant makes a "colorable showing" that a juror was exposed to an improper external influence *United States* v. *Davis*, 15 F.3d 1393, 1412-1413 (7th Cir.), cert. denied, 513 U.S. 896 (1994). In this case, unlike *Remmer*, petitioner has "presented no basis upon which to believe that Shelby even had experienced an external contact or communication regarding matters pending before the jury during her absence from the deliberations." Pet. App. A at 42. Rather, as the court of appeals found, "the record here suggests only that Shelby retired to a couch in the [c]lerk's office to lie down for about twenty minutes, not that she ever encountered any external influence pertaining to this case during that period." *Ibid.* Under those circumstances, the court of appeals correctly held that the district court did not abuse its discretion by declining to conduct a hearing on petitioner's wholly speculative claim. See *United States* v. *Barshov*, 733 F.2d 842, 851 (11th Cir. 1984) ("mere speculation" is not sufficient to require district court to investigate allegation that jury was

subjected to improper extrinsic influence), cert. denied, 469 U.S. 1158 (1985).[11]

c. Turner argues (Pet. 11-17) that the district court erred by not declaring a mistrial or excusing juror Golson after Golson informed the court that Turner had asked the jury to "take care of me," and that she had repeated the remark to other jurors. Turner contends (Pet. 14-15) that Golson thereby became a witness as to Turner's credibility, depriving Turner of his right to an impartial jury.

District courts have wide latitude in responding to allegations of juror misconduct or bias, and their decisions may be overturned only for abuse of discretion. See, *e.g.*, *United States* v. *Williams*, 77 F.3d 1098, 1100 (8th Cir.), cert. denied, 117 S. Ct. 392 (1996); *United States* v. *Newman*, 982 F.2d 665, 670 (1st Cir. 1992), cert. denied, 510 U.S. 812 (1993); *United States* v. *Easter*, 981 F.2d 1549, 1553 (10th Cir. 1992), cert. denied, 508 U.S. 953 (1993). In this case, the district court questioned Golson and each of the other jurors to whom she had repeated Turner's remark. The court concluded that "the jurors including Golson could be fair and impartial to Turner and all of the defendants." C.A. App. 648-650; see Pet. App. A at 47. Petitioner's challenge to the district court's findings does not warrant this Court's review. See *Arizona* v. *Washington*, 434 U.S. 497, 513 (1978) ("compelling in-

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[11] There is also no basis for Turner's contention (Pet. 8) that applicable restrictions on defense counsel's contacts with former jurors effectively precluded counsel from investigating the possibility that Shelby had been exposed to improper influences. As the court of appeals observed (Pet. App. A at 42), petitioner "could have tried to discover what happened to Shelby during her absence simply by talking to staff members of the Clerk's office."

stitutional considerations" justify appellate deference to trial judge's evaluation of allegation of juror bias).

5. Potter argues (Pet. 30-33) that the district court abused its discretion by denying her motion for severance. She claims (Pet. 33) that the joint trial subjected her to "prejudicial spillover" of evidence. Much of the evidence to which Potter objects, however, was relevant to her convictions for defrauding the government of tuition money and for aiding and abetting Frost and Turner in defrauding the University of the professors' honest services, which were upheld by the court of appeals. See Pet. App. A at 63 (noting that "the convictions of Frost and Potter which have withstood our review all rest upon overwhelming evidence" that "each defendant participated in a secret scheme in which the student defendants received their graduate degrees without having completed a legitimate thesis or dissertation").

As the court of appeals explained, moreover (Pet. App. A at 63), the trial court "minimized any prejudice" that might otherwise have resulted by "instructing the jury to consider only the evidence against each defendant on each charge, and to return separate verdicts, without regard to the other charges or defendants." The district court did not abuse its discretion in dealing with any possible prejudice in that manner rather than by granting a severance. See *Zafiro* v. *United States*, 506 U.S. 534, 538-539 (1993) (determination of risk of prejudice and any necessary remedy is left to sound discretion of district courts; limiting instructions "often will suffice to cure any risk of prejudice"). In any event, petitioner's severance claim presents no legal question of general importance and therefore warrants no further review by this Court.

6. Congo contends (Pet. 14-20) that the court of appeals was required to reverse his conviction for making a false material declaration before the grand jury (Count 31) because the district court decided the issue of materiality rather than submitting that question to the jury. As the court of appeals correctly held, that claim is foreclosed by this Court's decision in *Johnson* v. *United States*, 117 S. Ct. 1544 (1997).

In *Johnson*, as in this case, the defendant did not object at trial to the district court's failure to submit the element of materiality to the jury. 117 S. Ct. at 1547; see Pet. App. A at 57. The Court held that, in the absence of a timely objection, a district court's failure to submit an element of an offense to the jury is subject to plain-error review under Rule 52(b) of the Federal Rules of Criminal Procedure. 117 S. Ct. at 1548. Such an error does not warrant reversal of the underlying conviction unless, *inter alia*, it "seriously affect[s] the fairness, integrity, or public reputation of judicial proceedings." *Id.* at 1549 (quoting *United States* v. *Olano*, 507 U.S. 725, 732 (1993)). The Court determined that the defendant in *Johnson* had failed to establish her entitlement to relief under that standard because she had presented "no plausible argument" that her false statement was immaterial to the pertinent grand jury investigation. *Id.* at 1550.

As the court of appeals explained (Pet. App. A at 58), the false declaration for which Congo was convicted—*i.e.*, his testimony before the grand jury that FWG employees who worked on his dissertation "did so voluntarily and on the basis of friendship," rather than "out of compulsion and at the direction of Frost"—was clearly material to the grand jury's investigation

of the fraudulent degrees-for-contracts scheme.[12] Congo offers no reason to question the court of appeals' conclusion concerning the materiality of his false statements, instead arguing only that the statements were "literally true."[13] In the absence of any "plausible argument" that the statements were immaterial to the grand jury's investigation, the district court's failure to submit the element of materiality to the jury provides no basis for disturbing petitioner's conviction.

7. Finally, petitioners challenge the sufficiency of the evidence to support their convictions on various counts of the indictment. See Turner Pet. 18-19; Potter Pet. 26-30; Congo Pet. 9-11; Faulkner Pet. 6-10. Each of those claims is limited to the particular facts of this case and was properly considered and rejected by the court of appeals. Further review is not warranted.

CONCLUSION

The petitions for a writ of certiorari should be denied.

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[12] As the court of appeals recognized (Pet. App. A at 59), a defendant may be prosecuted for a false declaration whether or not the grand jury investigation in which the declaration is made ultimately leads to an indictment or conviction. The insufficiency of the evidence regarding the charged degrees-for-contracts scheme therefore does not affect the validity of Congo's conviction on Count 31. *Ibid.*

[13] The court of appeals rejected that claim, finding ample evidence to support the jury's finding that Congo lied about his belief that FWG employees offered to work on his dissertation as colleagues and friends. Pet. App. A at 55-56. Petitioner's disagreement with the court's assessment of the strength of the evidence against him has no importance beyond the specific circumstances of this case and therefore does not warrant review by this Court.

Respectfully submitted.

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